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Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35477

**ALLIED INDUSTRIAL DEVELOPMENT CORPORATION
- PETITION FOR DECLARATORY ORDER -**

REPLY OF RESPONDENTS

ENTERED
Office of Proceedings

APR 13 2011

Part of
Public Record

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Dated: April 13, 2011

REPLY OF RESPONDENTS

Preliminary Statement

It is difficult to determine how to respond to the Petition for Declaratory Order (the "Petition") filed by Allied Industrial Development Corporation ("Allied") on March 24, 2011. The Petition was ostensibly filed pursuant to a Judgment Entry (the "Referral Order") issued by Judge Maureen A. Sweeney of the Court of Common Pleas for Mahoning County, Ohio in *Allied Industrial Development Corporation v. Ohio Central Railroad, Inc. et al*, Case No. 09 CV 2835 (the "State Action"). Petition at 1; Petitioner's Appendix, Exhibit L. However, instead of asking the Board to decide the issues within its jurisdiction as directed by the Referral Order, Allied instead seeks to have the matter sent back to State Court because it contends that there are no issues within the jurisdiction (or expertise) of the Board. Petition at 2, 21. Respondents will limit this Reply to explaining why the Board should accept the referral and institute a declaratory order proceeding, and what questions should be addressed.¹

Board Authority to Institute Proceeding on Referral from State Court

Respondents do not oppose the initiation of a declaratory order proceeding by the Board. (Respondents were the moving party for referral in the State Court.²) The Board has discretionary authority to institute such a proceeding pursuant to the Board's authority under 5 USC §554(e) and 49 USC §721. The Board has previously noted:

¹ The other issues briefed at length by Allied are more appropriate for its opening statement when it will have the opportunity to present factual support for its positions. (Allied notes that the Petition is not intended as an opening statement, and that indeed if a proceeding is instituted it will need 90 days to put together its statement. Petition at 21, n.22)

² A copy of Defendants' Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board, and Memorandum in Support (without the appendix of unreported cases) ("Motion to Dismiss or Refer"), filed with the State Court on May 27, 2010, is included in Petitioner's Appendix, Exhibit H.

The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests, considering a number of factors, including the significance to the industry and the ripeness of the controversy. See *Delegation of Authority-Declaratory Order Proceedings*, 5 I.C.C.2d 675, 676 (1989). There, the ICC noted that petitions for issuance of a declaratory order premised on a court referral ***are routinely accepted*** and treated procedurally in the same manner as a complaint. It then delegated the responsibility for taking initial action in disposing of such matters to the Director of the Office of Proceedings. See 49 CFR 1011.7(b)(6) [now 49 CFR 1011.7(a)(2)(vi)].

Teck Metals Ltd. – Petition for Declaratory Order – Practices of Wheeling & Lake Erie Railway Company, STB Finance Docket No. 35324 (served January 22, 2010) at 1 (emphasis added). There is no reason the Office of Proceedings or Board should treat this referral any differently. See also *V&S Railway, Inc. – Petition for Declaratory Order – Railroad Operations in Hutchison, Kan.*, STB Docket No. FD 35459 (served February 16, 2011) (referral to examine disputes regarding the right to operate on the line, the ownership of the right of way, and the possible past abandonment of the line); *Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35196 (served March 1, 2010) (referral to determine whether proposed taking of railroad property would unreasonably interfere with rail transportation). The questions here have been referred by a court of competent jurisdiction, and the controversies at issue (as discussed more fully below) are within the Board’s primary jurisdiction. Accordingly, it is appropriate for the Board to initiate a proceeding pursuant to the Board’s authority under 5 USC §554(e) and 49 USC §721.

Brief Factual Background

So as not to burden the preliminary record, Respondents will refer to the documents included in Petitioner’s Appendix. Additionally, Respondents have attached as Attachment 1 to

this Reply, their Answer to Plaintiff's Amended Complaint which was not included in the other pleadings in Petitioner's Appendix.

Allied's Amended Complaint (Petitioner's Appendix, Exhibit B) alleges that by Purchase Agreement dated March 26, 2009, Allied purchased from Gearmar Properties ("Gearmar") two parcels of land known as Youngstown City Lots 62320 and 62188. Amended Complaint ¶13. Allied alleges that, at the time the Complaint was filed Respondents were using an office building on Lot 62188 and were utilizing both parcels to store railcars and other railroad related equipment. *Id.*, ¶¶17, 19. Allied further claims that Respondents have no right to be on either parcel and are trespassing. *Id.*, Count II. Pursuant to the Ohio Forcible Entry and Detainer Statute, Allied is seeking an order requiring Defendants to remove all equipment and materials and immediately vacate Lots 62320 and 62188. Allied also seeks damages allegedly resulting from Respondents' alleged trespass. *Id.*, Count III. Respondents believed that they had permission from Gearmar to continue to use Lot 62320 after the sale of the Lot to Gearmar, and indeed a portion of that use was the service of a rail customer who was leasing space on Lot 62320. Based on Allied's demands and its termination of the customer's lease, Respondents have fully vacated Lot 62320.

Respondents acknowledge that there are state law issues relating to the transfer and ownership of Lot 62188.³ Lot 62188 contains a portion of MVRV's main line, several yard

³ There is no dispute that Gearmar purchased Lot 62320 from Ohio & Pennsylvania Railroad, and then sold it to Allied. Respondents dispute, however, whether Lot 62188 which was owned by Mahoning Valley Railway Company ("MVRV") was properly included in the sale to Gearmar, and whether title could have passed to Allied. Regardless of the state law issues, Respondents further dispute whether Allied can exclude Respondents (in particular MVRV) from use of the rail lines and the office building located thereon. As set forth in Respondents' Answer to Plaintiffs Amended Complaint (Attachment 1 hereto), and its Amended Counterclaim and Third Party Complaint (Petitioners' Appendix, Exhibit E), Lot 62188, which was owned by Defendant MVRV, was never intended to be sold to Gearmar, and was instead included in the

tracks and switching tracks, and other rail facilities which have been used by MVRV since 1981. *See Mahoning Valley Railway Co. - Operation of a Line of Railroad in Mahoning County, OR*, ICC Finance Docket No. 29658 (Sub-1), 46 Federal Register 4007 (August 6, 1981). *See also* affidavit of David Collins (hereinafter "Collins Affidavit"), ¶3, attached as Exhibit B to the Motion to Dismiss or Refer (Petitioner's Appendix, Exhibit H). In addition, MVRV is the owner of Youngstown City Lot 62189 ("Lot 62189") which is contiguous to Lot 62188 and contains a shop which has been used by the Railroad Respondents for repairs of locomotives and other equipment, and for required Federal Railroad Administration ("FRA") inspections of locomotives. *Id.*, ¶4. MVRV used the tracks on Lot 62188 to serve its customers (including one that was located on Lot 62320 after the sale to Gearmar, and the subsequent sale to Allied⁴), and uses them to reach its interchange points with connecting railroads, CSX Transportation, Inc and Norfolk Southern Railroad Company, to store and stage cars, and to access its locomotive repair shop on Lot 62189. *Id.*, ¶7. Railroad Respondents also used the office building as the headquarters for the Youngstown-based Railroad Respondent operations. MVRV and the Railroad Defendants had been making daily use of the tracks, facilities and property prior to the 2007 sale of Lot 62320 to Gearmar Properties, Inc., and continued to do so thereafter.⁵ *Id.* Railroad Respondents never intended to transfer or abandon the use of any of the railroad facilities on Lot 62188. *Id.*, ¶11. Without the use of such facilities, MVRV would not be able to move traffic from one side of Lot 62188 to the other, or make any use of its locomotive shop on

deed transferring Lot 62320 to Gearmar as a result of a mistake, scrivener's error or material alteration, making the transfer void.

⁴ Allied subsequently terminated the lease of the customer.

⁵ As a result of threatened lock-out by Allied, Respondents voluntarily vacated the office building under protest until the issues in this proceeding are resolved. *Id.*

Lot 62189, which would materially interfere with its ability to meet its common carrier obligations. *Id.*, ¶¶8, 11. MVRV's current use of its line of railroad, other tracks and facilities on Lot 62188 is diminished because of a reduction of traffic from its customers (including the customer whose lease was terminated by Allied), and because of the litigation. However, the rail line, tracks and other facilities are still essential to MVRV's continued operations and fulfillment of its common carrier obligations.

All of the Defendants other than Summit View and GWI are Class III rail carriers authorized to operate as common carriers by the Surface Transportation Board ("STB"), or its predecessor the Interstate Commerce Commission ("ICC"), and all are engaged in interstate commerce. *Id.*, ¶9. However, MVRV is the only carrier operating on and over the tracks on Lot 62188. Summit View and GWI are the respective direct parent and indirect corporate parent of the Railroad Defendants; they are not operating railroads and do not directly use any of the rail lines, tracks, other railroad facilities or property at issue in this proceeding. *Id.*, ¶10.

Respondents sought to have the State Court Action removed to federal court because of the federal preemption issues involved. The U.S. District Court remanded the case to State Court finding that there was not "complete preemption" of the state law claims, and therefore the case could not be removed. Opinion and Order dated March 15, 2010 (Petitioner's Appendix, Exhibit F). While Respondents disagree with the Court's determination, it is important to note that the Court was only making a jurisdictional determination with respect to removal. *Id.* at 6-7. The Court specifically stated: "The Court does not resolve the separate issue of whether the ICCTA's preemption clause provides a defense to Allied Industrial's claims – an issue that the defendants are free to raise in the state court." *Id.* at 7. Respondents did exactly that by filing

their Motion to Dismiss or Refer with the State Court. The State Court agreed that there were potential preemption defenses, and issued the Referral Order.

I. Questions Presented

In the Petition, Allied asserts that there are no issues within the Board's jurisdiction. However, that is clearly not the case.⁶ Judge Sweeney, after considering Respondents' Motion to Dismiss or Refer, and Allied's Brief in Opposition found:

[T]he Court further finds that the state issues should be stayed and all issues regarding railways and other related issues within the Surface Transportation Board's jurisdiction be resolved first.

Therefore, this Case is hereby stayed and the matter referred to the Surface Transportation Board for the adjudication of all issues within its jurisdiction.

State Action, Judgment Entry (filed September 22, 2010), Petitioner's Appendix, Exhibit L.

Since the Referral Order was based on the issues and arguments raised in Respondents' Motion to Dismiss or Refer, it is the primary source the Board should reference in determining what questions it should address in this proceeding.⁷ The questions, all of which are within the jurisdiction of the Board to determine, can be summarized as follows:

- (1) Does the ICC Termination Act, 49 USC §10101 *et seq.* ("ICCTA") preempt Allied's state law claims seeking immediate eviction from Lot 62188 and damages? [Motion to Dismiss or Refer at 6-9]
- (2) Has MVRV abandoned its rail lines, yard tracks, access tracks or other railroad facilities on Lot 62188? If not, can Allied force abandonment through a state law

⁶ It could be argued that the fact that Allied needed 20 pages to explain why there is no controversy for the Board to determine, in fact confirms that there are significant federal statutory and commerce issues in dispute.

⁷ The Motion to Dismiss or Refer suggests that it would also be appropriate, if referral were granted, to include the issues raised in Count II of Respondents Amended Counterclaim and Third Party Complaint. Motion to Dismiss or Refer at 17. The Amended Counterclaim and Third Party Complaint is included in the Petitioner's Appendix as Exhibit E.

eviction proceeding? [Motion to Dismiss or Refer at 9-14, 17; Amended Counterclaim and Third Party Complaint, ¶¶37, 41]

- (3) Are Allied's state law claims for damages preempted by ICCTA? [Motion to Dismiss or Refer at 14]
- (4) Is the purported sale of Lot 62188 void since the purchaser did not obtain Board authority to acquire the lines of railroad, tracks or other railroad facilities and/or common carrier obligations related thereto? [Motion to Dismiss or Refer at 17, n.9; Amended Counterclaim and Third Party Complaint, Count II, ¶¶ 35-36]
- (5) Would Allied's state court claims, if granted, unreasonably interfere with MVRV's operations in interstate commerce in violation of the Commerce Clause? [Motion to Dismiss or Refer at 17, n.9; Amended Counterclaim and Third Party Complaint, Count II, ¶¶ 40, 42]

These questions are also raised in Respondents' other State Court Pleadings. *See* Answer to Amended Complaint, Attachment 1, 2nd affirmative defense (ICCTA preemption), 3rd affirmative defense (unreasonable burden on interstate commerce), 4th affirmative defense (no authority to acquire lines of railroad or other transportation facilities under 10901 and sale as void), 5th affirmative defense (relief would require cessation of service without STB authorization under 10903).

The Petition makes clear that Allied does not agree with Respondents' interpretation and suggested application to the current facts of federal preemption or the requirements under ICCTA for Board approval before property with rail lines and other rail facilities can be transferred or service can be abandoned. However, the Petition through its discussion acknowledges the following issues that are within the Board's jurisdiction to determine – (1) whether a railroad can contract to sell property with lines of railroad, and whether a contract that would interfere with the ability to perform common carrier obligations is enforceable (Petition at 7-10); (2) the character of the tracks on Lot 62188 as a line of railroad or as "excepted" track under 49 USC §10906 (Petition at 11-18); and (3) the jurisdiction of the Board and ICCTA with

respect to “excepted” track where the railroad has continuously used, and given no evidence of abandonment, of the tracks (Petition at 11-18).⁸ It is thus clear that the issues raised in this proceeding are within the Board’s jurisdiction, are significant to the railroad industry, and are ripe for review. There is no reason that the state law claims need to be resolved first, and in fact, Judge Sweeney has clearly indicated that she wants the federal issues determined first.⁹

No Authority to Award Costs

Allied has not presented any justification or authority for assessing Respondents with the filing fee for Allied’s Petition. The Board does not generally award expenses. *See The Springfield Terminal Railway Company – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. 42108 (served June 22, 2009) (and the cases cited therein), at 2. Further, the Petition was filed by Allied because Judge Sweeney, after due consideration of Respondents’ Motion to Dismiss or in the Alternative Refer, and Allied’s Brief in Opposition, determined that there were transportation issues on which she wanted the initial determination of the Board.

⁸ Respondents acknowledge that, if the Board does not void the purported transfer of Lot 62188, there still could be state law issues that would determine the validity of the deed. However, that does not affect the jurisdiction of the Board or the determination of whether Allied can interfere with MVRV’s common carrier obligations. That jurisdiction applies regardless of ownership.

⁹ Respondents recognize that the Board has sometimes found the facts are so clear that it can make the determination that state law claims for ejectment and damages are preempted without the need for a declaratory order proceeding. *See Mark Lange - Petition for Declaratory Order*, STB Finance Docket No. 35037 (served January 28, 2008); *Joseph R. Fox - Petition for Declaratory Order*, STB Finance Docket No. 35161 (served May 18, 2009). Respondents suggest that if the Board determines not to institute a proceeding, it should do so only if it determines that MVRV has not abandoned its rail line, tracks and other facilities on Lot 62188, and directs the State Court to dismiss Allied’s claims for an order to vacate the premises, and for damages.

Procedural Schedule

Although not specifically requested in the Petition, Respondents request that the Board consider this matter under the modified procedure rules at 49 CFR part 1112 as is common in other proceedings under referrals from the courts. *See, for example, West Point Relocation, Inc. and Eli Cohen – Petition for Declaratory Order*, STB Finance Docket No. 35290 (served October 23, 2009). In footnote 22 on page 21 of the Petition, Allied finally addresses a procedural schedule for this proceeding. While suggesting that it would need 90 days file its opening statement, it provides only 30 days for Respondents to reply. Although it seems appropriate for each party to have the same amount of time for its initial statements, Respondents suggest that their reply be due 60 days thereafter. Accordingly, Respondents suggest the following procedural schedule;

Day 0	-	Board institution of proceeding
Day 90	-	Petitioner's Opening Statement
Day 150	-	Respondents' Reply
Day 180	-	Petitioner's Rebuttal

Conclusion

For the reasons set forth above, Respondents request that the Board accept the referral and the Petition, institute a declaratory order proceeding, and establish a procedural schedule to address the issues set forth above and any others that the Board deems appropriate.

Respectfully submitted,



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Counsel for Respondents

Dated: April 13, 2011

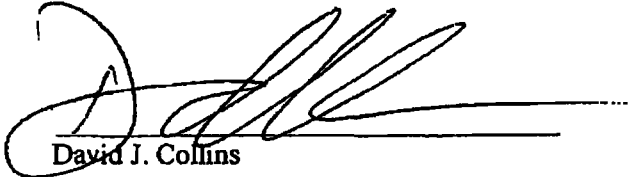
VERIFICATION

I am the Senior Vice President of the New York, Pennsylvania and Ohio Region of Genesee & Wyoming Inc. ("GWI"). In that capacity, I am the President and in charge of the railroads that comprise the Youngstown Division of the Ohio Central Railroad System, including the railroads named as Respondents in this proceeding. GWI acquired control of Summit View, Inc. ("Summit View"), and the railroads under its control, in January 2009. My direct knowledge of the issues herein begin at that time. As to matters before January 2009 my knowledge is based on my investigation of prior practices of the Railroad Respondents and discussions with former employees of Summit View and the railroads, and on the discovery that has taken place in the state court litigation proceedings between Respondents and Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation.

Based on the foregoing, I hereby verify on behalf of Respondents, under penalty of perjury, that the Reply of Respondents, is true and correct to the best of my information and belief.

Further, I certify that I am qualified and authorized to file this Verification.

Executed on April 13, 2011.



David J. Collins

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2011, a copy of the foregoing Reply of Respondents, was served upon the following persons by US first class mail, postage prepaid, and by email where indicated:

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ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALLIED INDUSTRIAL DEVELOPMENT)	CASE NO. 4:09 CV 01904
CORP.)	
)	JUDGE JAMES S. GWIN
Plaintiff)	
)	
vs.)	
)	
OHIO CENTRAL RAILROAD, INC., ET)	
AL.,)	
)	
Defendants)	
)	
)	

DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

NOW COME Defendants, The Ohio Central Railroad, Inc., The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., The Youngstown Belt Railroad Company, and Genesee & Wyoming, Inc., and Summit View, Inc. by and through their legal counsel and in Answer to Plaintiff's Amended Complaint state as follows:

1. In response to paragraph 1 of Plaintiff's Amended Complaint, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same.

2. In response to paragraph 2 of Plaintiff's Amended Complaint Defendants state that "The Ohio Central Railroad System" is merely a trade name that is used for limited business purposes. Defendants deny the remainder of the allegations contained in paragraph 2 of Plaintiff's Amended Complaint.

3. Defendants admit the allegations contained in paragraph 3 of Plaintiff's Amended Complaint.

4. Defendants admit the allegations contained in paragraph 4 of Plaintiff's Amended Complaint.

5. Defendants admit the allegations contained in paragraph 5 of Plaintiff's Amended Complaint.

6. Defendants admit the allegations contained in paragraph 6 of Plaintiff's Amended Complaint.

7. Defendants admit the allegations contained in paragraph 7 of Plaintiff's Amended Complaint.

8. Defendants admit the allegations contained in paragraph 8 of Plaintiff's Amended Complaint.

9. Defendants admit the allegations contained in paragraph 9 of Plaintiff's Amended Complaint.

10. Defendants admit the allegations contained in paragraph 10 of Plaintiff's Amended Complaint.

11. Defendants admit the allegations contained in paragraph 11 of Plaintiff's Amended Complaint to the extent that Genesee & Wyoming Inc. ("GWI") is an indirect parent of the railroads described in paragraphs 3 through 8 of Plaintiff's Amended Complaint. It is denied that GWI directly owns the stock of such railroads, and it is further denied that GWI is an "operator" of such railroads or their properties.

12. In response to paragraph 12 of Plaintiff's Amended Complaint Defendants deny that a State Court has any jurisdiction over these Defendants and say instead that Plaintiff's claims fall under the exclusive jurisdiction of the Surface Transportation Board ("STB") pursuant to 49 U.S.C. §§10101 et seq.

13. In response to paragraph 13 of Plaintiff's Amended Complaint Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same. By way of further answer, it is denied that Gearmar was the rightful owner of described parcels of property or of the property located thereon, including without limitation, the tracks and track materials.

14. Defendants admit the allegations contained in paragraph 14 of Plaintiff's Amended Complaint.

15. Defendants admit the allegations contained in paragraph 15 of Plaintiff's Amended Complaint.

16. Defendants admit the allegations contained in paragraph 16 of Plaintiff's Amended Complaint.

17. Defendants deny the allegations contained in paragraph 17 of Plaintiff's Amended Complaint.

18. Defendants deny the allegations contained in paragraph 18 of Plaintiff's Amended Complaint.

19. Defendants deny the allegations contained in paragraph 19 of Plaintiff's Amended Complaint.

20. In response to paragraph 20 of Plaintiff's Amended Complaint Defendants admit that they received the correspondence attached to Plaintiff's Amended Complaint as Exhibit 1. In further response Defendants state the letter speaks for itself and deny any allegations contained in paragraph 19 which fail to comport to the terms of the letter, and further deny any legal conclusions set forth in the letter.

21. Defendants deny the allegations contained in paragraph 21 of Plaintiff's Amended Complaint.

22. In response to paragraph 22 of Plaintiff's Amended Complaint Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same.

23. Defendants reallege and reaver their responses to the allegations contained in paragraphs 1 through 22 as if fully rewritten herein.

24. Defendants deny the allegations contained in paragraph 24 of Plaintiff's Amended Complaint.

25. Defendants deny the allegations contained in paragraph 25 of Plaintiff's Amended Complaint.

26. Defendants deny the allegations contained in paragraph 26 of Plaintiff's Amended Complaint.

27. Defendants deny the allegations contained in paragraph 27 of Plaintiff's Amended Complaint.

28. Defendants deny the allegations contained in paragraph 28 of Plaintiff's Amended Complaint.

29. Defendants reallege and reaver their responses to the allegations contained in paragraphs 1 through 28 as if fully rewritten herein.

30. Defendants deny the allegations contained in paragraph 30 of Plaintiff's Amended Complaint.

31. Defendants deny the allegations contained in paragraph 31 of Plaintiff's Amended Complaint.

32. Defendants deny the allegations contained in paragraph 32 of Plaintiff's Amended Complaint.

33. Defendants deny the allegations contained in paragraph 33 of Plaintiff's Amended Complaint.

34. Defendants deny the allegations contained in paragraph 34 of Plaintiff's Amended Complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

35. The State Court lacks subject matter jurisdiction.

SECOND AFFIRMATIVE DEFENSE

36. Plaintiff's claims are strictly limited to, and governed by, the Interstate Commerce Commission Termination Act (ICCTA) 49 USC §10101, et seq., which law pre-empts any and all state law claims. Plaintiff's claims, rights and remedies are limited to those afforded by the ICCTA.

THIRD AFFIRMATIVE DEFENSE

37. The relief requested by Plaintiff, if granted, would place an unreasonable burden on interstate commerce in violation of the United States Constitution, Commerce Clause (Article I, Section 8) and the Supremacy Clause (Article VI, Clause 2).

FOURTH AFFIRMATIVE DEFENSE

38. Neither Gearmar nor Plaintiff obtained authorization from the STB under 49 USC §10901 to acquire Youngstown Lot No. 62188 and the lines of railroad and other transportation facilities located thereon. Accordingly, any purported sale to Gearmar or Plaintiff is void.

FIFTH AFFIRMATIVE DEFENSE

39. The relief requested by Plaintiff, if granted, would require The Mahoning Valley Railway Company to cease service over the lines of railroad located on Youngstown Lot No. 62188 without prior STB authorization in violation of 49 USC §10903.

SIXTH AFFIRMATIVE DEFENSE

40. Defendants state that Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SEVENTH AFFIRMATIVE DEFENSE

41. Plaintiff's claims are barred by the doctrines of laches, estoppel and waiver.

EIGHTH AFFIRMATIVE DEFENSE

42. Plaintiff's damages, if any, are a result of Plaintiff's own actions or failure to act or the negligence or comparative negligence of parties not present in this action.

NINTH AFFIRMATIVE DEFENSE

43. Plaintiff has failed mitigate its damages.

TENTH AFFIRMATIVE DEFENSE

44. Plaintiff has failed to exhaust its administrative remedies.

ELEVENTH AFFIRMATIVE DEFENSE

45. The Answering Defendants do not use and have never used the parcel of property at issue in this case.

RESERVATION OF RIGHTS

46. Defendants/Third Party Plaintiffs reserve the right to during and up to a reasonable period of time after the completion of discovery to add additional defenses.

WHEREFORE, having fully answered Plaintiff's Amended Complaint, Defendants/Third Party Plaintiffs pray that said Complaint be dismissed at Plaintiff's costs and such other relief as the Court deems proper.

Respectfully submitted,

/s/Thomas J. Lipka

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer was served upon the following counsel of record by operation of the Court's CM/ECF system this 13th day of November, 2009:

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